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IN THE

Supreme Court of the United States

October Term 1960

No. 732

WALGREEN CO., an Illinois Corporation,

Appellant,

vs.

COMMISSIONER OF TAXATION,

Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MINNESOTA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

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Appellee pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States moves the Court to dismiss this appeal or to affirm the judgment below for the following reasons:

There is no substantial Federal question presented as a basis of jurisdiction in this Court, because the questions presented have been foreclosed by previous decisions of this Court.

Wherefore, appellee moves the Court to dismiss the appeal in this cause for want of a substantial Federal question or, in the alternative, to affirm the judgment of the Supreme

Court of the State of Minnesota from which this appeal was taken for the reason that the question presented is foreclosed by prior decisions of this Court.

ARGUMENT IN SUPPORT OF MOTION, STATEMENT OF THE CASE INCLUDING THE FACTS

This case arises under the Minnesota Income and Franchise Tax, Minnesota Statutes, Section 290.02, which imposes a tax, inter alia, upon foreign corporations doing business within Minnesota for the transaction of local business within the State or for the privilege of transacting local business within the State measured by the taxpayer's net income.

Net income entering into the measure of the tax is computed under principles set out in Minnesota Statutes, Section 290.19, which is contained in Appendix C of the appellant's Jurisdictional Statement. The appellant contends that the separate accounting method, referred to therein, should be employed in computing its income for the purposes of the tax while appellee insists that statutory deductions should be first deducted from gross income, that the resulting net income should then be allocated on the basis of the formula set out at page eight of appellant's Jurisdictional Statement.

Appellant is an Illinois corporation authorized to do business in Minnesota. Plaintiff operates retail drug stores in nine states. Among these is Minnesota. The territory served by appellant is divided into districts which are supervised by district managers appointed by appellant's home office in Chicago. One such district consisted in the State of Minnesota and stores located in Eau Claire, Wisconsin, and

Aberdeen, South Dakota. The appellant is a unitary business; its various parts are interdependent and of mutual benefit. This was found by the trial court and has never been challenged by appellant. In the operation of its unitary business, appellant maintains central purchasing, accounting, management, branch supervision and a central real estate department which handles real estate negotiations throughout appellant's operations.

Appellant presents no evidence or argument that its position in Minnesota is in any way unique nor that its operations in Minnesota are in any way separate from those outside Minnesota. On the contrary, appellant agrees that the portion of its business which is carried within Minnesota is similar to that carried on elsewhere as part of one unified operation.

It is submitted that the question presented has been decided adversely to the appellant by previous decisions of this Court.

Appellant claims that one of the issues in this case is whether or not it has the right to show that the use by defendant of a formula in allocating appellant's taxable income to Minnesota violates the Due Process Clause and the Commerce Clause of the United States Constitution.

Appellant has never been denied this right. Appellant was accorded full and fair hearings at both the administrative and judicial level. At the trial in Minnesota District Court, not one item of evidence offered by appellant was excluded. Appellant just has not been denied this right.

Appellee has never taken the ridiculous position ascribed to it by appellant at page fourteen of the Jurisdictional Statement where appellant states:

> "Appellee has always maintained that appellant must use the formula regardless of whether appellant can

show that the formula violates both the Due Process Clause and the Commerce Clause of the United States Constitution."

On the contrary, appellee's position is that under Minnesota Statutes, Section 290.19, appellant must use the three factor formula of property, payroll and sales because this formula most fairly allocates taxable income to Minnesota. Appellee further maintains and has always maintained that requiring appellant to use the three factor formula does not violate the United States Constitution in any way. Appellee has never been heard to say that appellant may be subjected to unconstitutional taxation.

The only real issue in this appeal then is whether or not appellant's rights under the Due Process Clause and the Commerce Clause of the United States Constitution have been violated by requiring it to use the statutory three factor formula of property, payroll and sales in allocating net income to Minnesota for the purposes of the Minnesota Franchise Tax on corporations doing a local business.

Appellee submits that further consideration of this question is foreclosed by this Court's decision in *Butler Bros. v. McColgan*, 315 U.S. 501. There, a franchise tax on corporations measured by net income was at issue, as is here. There, a corporation was doing business within and without the taxing state as here. There, the corporation sought to allocate its taxable income to the taxing state by means of the separate or segregated accounting method as the taxpayer did here. There, the taxing authorities allocated income to the taxing state by means of the three factor formula composed of property, payroll and sales as did the taxing authorities in this case. Separate or segregated accounting

resulted in assigning a loss to the taxing state as in the case at bar. Apportionment under the formula resulted in assigning a substantial amount of taxable net income to the taxing state as in this case. The taxpayer there, as does appellant, contended that use of the three factor formula violated the Due Process Clause of the Fourteenth Amendment because such use appropriated to the taxing state income earned outside such state.

As in *Butler Bros. v. McColgan*, the taxpayer here has attempted to convince the Court by the means of separate accounting based on its books of account that the formula imports income for tax purposes. The burden of each argument is identical. Appellant would have the Court believe it presents a novel and different argument because its separate accounting attributes less net income to Minnesota than the formula when its home office expense is not deducted. But this argument has no more validity than the argument that separate accounting, considering all expenses, attributes less to the taxing state simply because the figures in appellant's calculation are based entirely on its separate accounting.

Under *Butler Bros. v. McColgan*, supra, the appellant has the burden of showing by clear and convincing evidence that the formula results in extraterritorial taxation. The appellant does not discharge its burden by showing different results under separate accounting.

It should also be noted that the court in *Eldorado Oil Works v. McColgan*, 340 U.S. 804, and *John Deere Plow Company of Moline v. Franchise Tax Board of California*, 343 U.S. 939, dismissed appeals for want of a substantial federal question in cases parallel to that presented here.

Appellant places chief reliance on *Hans Rees' Sons Inc. v.*

North Carolina, 283 U.S. 123, but nothing that was done or said in that case has any application. First, a single factor of property was employed in the formula which operated to attribute an average of 79% of the taxpayer's income to the taxing state while the taxpayer's evidence tended to prove that only 17% of its income was actually earned in the taxing state. Here, however, a three factor formula has been employed, which not only gives weight to appellant's outside selling activities, but to other outside activities as well. Significant, too, is the following extension of the figures appearing at pages 28 and 29 in the Appendix to the Jurisdictional Statement. Percentage figures have been inserted by appellee.

National Sales (after cost of goods sold) Compared to Minnesota Sales (after cost of goods sold)

Year	National	Minnesota	Minnesota Percentage of National
1950	$28,685,125	$1,539,355	5.37
1951	29,941,617	1,664,580	5.56
1952	28,571,655	1,640,968	5.74
1953	28,400,530	1,544,168	5.44
	Average		5.52

National Net Income Compared to Minnesota Net Income Computed under the 3 Factor Formula

Fiscal Year Ending	National Net Income	Minnesota Net Income, 3 Factor Formula	Minnesota Percentage of National
Sept. 30, 1950	$4,683,825	$ 98,265.55	2.10
Sept. 30, 1951	3,226,669	122,550.53	3.80
Sept. 30, 1952	2,815,762	115,194.26	4.09
Sept. 30, 1953	2,527,707	113,823.04	4.50
	Average		3.62

Certainly this situation is not comparable to *Hans Rees' Sons, Inc. v. North Carolina*, supra, where the single factor formula assigned an average of 79% of the taxpayer's income to the taxing state and the taxpayer demonstrated that only 17% of the income was earned in the taxing state. Certainly there can be no violation of due process when an average of 5.52% of appellant's income is earned in Minnesota and the state includes only an average of 3.62% of such income in the measure of the tax. Certainly the outer limits of a state's taxing power has not been reached when a state has included less income in the measure of the tax than was actually earned in the state. Certainly in this posture of the case, there can be nothing arbitrary or unreasonable about the application of the formula.

Nor does the contention by appellant that the allocation of income by appellee violates Article 1, Section 8, Clause 3, of the United States Constitution merit consideration by this Court. First, because the appellant does not demonstrate or even contend that any of the income here in question resulted from transactions in interstate commerce. As a matter of fact, at page 10 of the Jurisdictional Statement, appellant in effect states that it is not engaged in interstate commerce. Secondly, even if appellant were engaged exclusively in interstate commerce, the apportionment would still be valid because only the instate or local aspects of appellant's activities, in so far as Minnesota is concerned, have been utilized in determining the taxable measure. Even as to persons engaged exclusively in interstate commerce, the Constitution requires only that entire net income be fairly apportioned by utilizing instate activities to determine the portion attributable to the taxing state. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450.

Michigan Wisconsin Pipeline v. Calvert, 347 U.S. 157, and *Central Greyhound Lines v. Mealey*, 334 U.S. 653, have no application to this case inasmuch as they concerned taxpayers engaged exclusively in interstate commerce. Furthermore, the *Michigan Wisconsin Pipeline* case had nothing to do with allocation but decided that the incident of the questioned tax was laid in interstate commerce and therefore fatal. Here the tax is, by appellant's own admission, related only to local activities. *Central Greyhound Lines v. Mealey*, supra, decided that as to taxpayer engaged in interstate commerce a tax must be based on apportionment. Here the tax base is apportioned.

CONCLUSION

Inasmuch as appellant's contentions concerning violation of the United States Constitution have been foreclosed by previous decisions of this Court, we respectfully submit that this appeal should be dismissed or in the alternative that the judgment of the Supreme Court of the State of Minnesota should be affirmed.

Respectfully submitted,

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